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No. 90-662

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1990

INSURANCE COMPANY OF NORTH AMERICA,

*Petitioner,*

v.

M/V "OCEAN LYNX," a/k/a/ M/V "OCEAN LINK," her engines, tackle, furnishings, etc., *in rem*, MAR SHIPPING LINE, INC.; and A. BOTTACCHI S.A. DE NAVEGACION,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the Court of Appeals' holding that BOTTACCHI provided the shipper with a fair opportunity to avoid the COGSA $500.00 package limitation where its bill of lading contained a clause paramount invoking the provisions of COGSA and a clause which specifically stated that a shipper may avoid the $500.00 per package limitation by declaring the nature of the goods and a valuation higher than $500.00 in writing, and inserting this in the bill of lading, and paying extra freight if required is in direct conflict with any decisions of this Court.

2. Whether the Court of Appeals' findings with regard to fair opportunity and the legibility of the bill of lading are in direct conflict with the prior findings of the Ninth and Fourth Circuits.

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*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

## OPINION BELOW

The Opinion of the Court of Appeals is reported at 901 F.2d 934 (11th Cir. 1990).

## JURISDICTION

The Judgment of the Court of Appeals was entered on August 14, 1990. The Petition for Writ of Certiorari

was filed on September 18, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Respondents, MAR SHIPPING LINE, INC. and A. BOTTACCHI S.A. DE NAVEGACION, have joined in their Brief in Opposition to the Petition for Certiorari. The parties shall be referred to as the Petitioner, the Respondents or by name for added clarity.

The Respondents object to the Petitioner's Statement of the Case as an incomplete and incorrect statement. The Petitioner failed to state that the BOTTACCHI bill of lading contains a clause paramount which invokes the provisions of the Carriage of Goods by Sea Act, ("COGSA") 46 U.S.C. 1300 *et seq.* and a clause which specifically provides that a shipper may avoid the $500.00 package limitation by declaring the nature of the goods and a valuation higher than $500.00 in writing, and inserting this in the bill of lading and paying extra freight if required. (A-22). Petitioner further fails to state that the District Court and Court of Appeals specifically found that the Petitioner's assured evidenced a clear intent not to declare the nature and value of its shipment in writing, insert this in the bill of lading, and pay a higher freight, if any. (A-21).

Petitioner incorrectly states that the Court of Appeals found the MAR bill to be illegible. On the contrary, the Court of Appeals found that some of the MAR bills of lading were printed clearly. (A-20). The Court of Appeals also noted that the District Court found that the MAR bill

of lading could be read with the aid of a magnifying glass. (A-18). The District Court also read the relevant portions of the MAR bill of lading into the record at trial.

## ARGUMENT

**I. THE COURT OF APPEALS' HOLDING THAT BOTTACCHI PROVIDED THE SHIPPER WITH A FAIR OPPORTUNITY TO AVOID THE COGSA $500.00 PACKAGE LIMITATION WHERE ITS BILL OF LADING CONTAINED A CLAUSE PARAMOUNT INVOKING THE PROVISIONS OF COGSA AND A CLAUSE WHICH SPECIFICALLY STATED THAT A SHIPPER MAY AVOID THE $500.00 PER PACKAGE LIMITATION BY DECLARING THE NATURE OF THE GOODS AND A VALUATION HIGHER THAN $500.00 IN WRITING, AND INSERTING THIS IN THE BILL OF LADING, AND PAYING EXTRA FREIGHT IF REQUIRED IS NOT IN DIRECT CONFLICT WITH ANY DECISIONS OF THIS COURT.**

Petitioner contends that a carrier who permits a shipper to avoid the $500.00 per package COGSA limitation by declaring in writing the nature and value of the shipment, and inserting this information in the bill of lading, has not provided the shipper with a fair opportunity to avoid the $500.00 per package COGSA limitation unless the shipper is charged a higher freight rate when exercising this option. This illogical contention raises no issue warranting review by this Court.

COGSA imposes no requirement upon the carrier to charge a shipper a higher freight rate when declaring the nature and value of a shipment so as to avoid the $500.00 per package COGSA limitation. COGSA only requires

that "the nature and value of [the] goods have been declared by the shipper before shipment and inserted in the bill of lading." BOTTACCHI clearing complied with this requirement by virtue of the clause paramount in the bill of lading. The clause paramount establishes that: (1) COGSA is applicable at times when it would not apply of its force; (2) COGSA's provisions are deemed incorporated into the bill of lading; and (3) nothing in the bill of lading can increase the carrier's liability under COGSA, thereby overruling any clause in the bill of lading which conflicts with COGSA. *Brown & Root, Inc. v. M/V "PEISANDER,"* 648 F.2d 451, 420 (5th Cir. 1981). The BOTTACCHI bill of lading also contains a clause which recites the provisions of the COGSA $500.00 per package limitation, 46 U.S.C. 1304(5). This clause provides the shipper with constructive notice of the fair opportunity to declare an excess value and spells out how the shipper can declare an excess value. *Id.* at 424-425.

None of the cases which the Petitioner claims are in conflict with the Court of Appeals' decision involved an action under COGSA. In addition, contrary to the Petitioner's contention, none of the decisions hold that a carrier is required to charge a shipper at higher freight rate in order for the shipper to avoid a limitation of liability. The *New York, N.H. & Hartford R. Co. v. Nothnagle,* 347 U.S. 128, 73 S.Ct. 986, 97 L.Ed. 1500 (1953) decision holds that a carrier subject to the Interstate Commerce Act could not limit its liability for a claim of lost baggage pursuant to a limitation of liability provision in its tariff which the passenger had no reasonable opportunity to discover. The *Boston & Maine R. Co. v. Piper,* 246 U.S. 439, 38 S.Ct. 354, 62 L.Ed. 820 (1918) decision holds that a

carrier subject to the Interstate Commerce Act could not contractually exempt itself from liability for its own negligence in exchange for a reduced freight rate. The *Union Pacific L. Co. v. Burke*, 255 U.S. 317, 41 S.Ct. 283, 65 L.Ed. 656 (1921) decision holds that a carrier subject to the Interstate Commerce Act could not limit its liability pursuant to a limitation of liability clause in its bill of lading and tariff where the shipper was not provided with a means or opportunity to avoid the limitation of liability.

Accordingly, the Court of Appeals' decision is not in conflict with the applicable statute, Supreme Court decisions, or other Court of Appeals' decisions and the Petition for Writ of Certiorari should be denied.

## II. THE COURT OF APPEALS' FINDINGS WITH REGARD TO FAIR OPPORTUNITY AND THE LEGIBILITY OF THE BILL OF LADING ARE NOT IN DIRECT CONFLICT WITH THE PRIOR FINDINGS OF THE NINTH AND FOURTH CIRCUITS.

The issue of fair opportunity has been addressed repeatedly by all the circuits dealing in COGSA cases. In all cases, the courts have looked at the evidence before them regarding a short form bill of lading, a long form bill of lading, the tariff and the experience of the shipper or its agents. The decisions of the 9th Circuit have in some cases been more stringent on the requirements for the finding of "fair opportunity." More recently however, on two occasions the 9th Circuit has refused to extend the definition further.

In *Carmen Tool & Abrasives Inc. v. M/V Ever Giant, Evergreen Lines*, 871 F.2d 897 (9th Cir. 1989), the court

refused to extend the concepts of fair opportunity in a situation where a shipper did not receive the bill of lading prior to departure of the vessel in order for notice to be sufficient.

In *Institute of London Underwriters and Ferguson and Co. v. Sea-Land Service, Inc.*, 881 F.2d 761 (9th Cir. 1989), the Court stated that if the bill of lading contains a clause expressly stating that the shipper has an opportunity to avoid the $500.00 package limitation by declaring a higher value, that will constitute *prima facie* evidence of fair opportunity. In *Institute of London*, the 9th Circuit affirmed findings of the District Court regarding the shippers sophistication as relevant toward the finding of fair opportunity.

The issue of opportunity in this case is not in any way consistent factually with that in the 9th Circuit case of *Pan American World Airways, Inc. v. California Stevedoring & Ballast Company*, 559 F.2d 1173 (9th Cir. 1977) as cited by Petitioner. In that case, the Court found that language on the reverse of the bill of lading did not provide for proper notice since it did not track the language of COGSA. Additionally, there were no other factors offered or considered such as the tariff or other reasonable means of notice.

The 4th Circuit has similarly stated its requirements for fair opportunity based on the facts. Petitioner asserts that the 4th Circuit requires the liability language on the face of the bill of lading citing *Cincinnati Milacron, Ltd. vs. M/V American Legend*, 784 F.2d 1161 (4th Cir. 1986). The case cited by Petitioner has been reversed by the 4th Circuit on rehearing, *en banc*, 804 F.2d 837 (4th Cir. 1987).

The Court reversed for the reasons stated in the dissent. The dissent stated that the limitation need not appear on the face of the bill of lading and held:

> "while it may indeed be unfair to hold the newcomer or unsophisticated shipper to the terms of COGSA when they nowhere appear in the shipping documents, it does not seem unduly burdensome to impute to shippers, knowledge to all of the terms in the more accessible long form bill of lading including, where they appear, the applicable provisions of COGSA." at pg. 2160.

The 4th Circuit in *Mu, Inc. v. Puerto Rico Maritime Shipping Authority*, 829 F.2d 1120 (4th Cir. 1987) reviewed its holding in *Cincinnati Milacron*, and held that a short form bill of lading not stating the limitation which incorporates a long form bill which did contain the language was sufficient opportunity. Of particular importance against Petitioner's argument in support of writ of certiorari is the fact that the 4th Circuit stated in *Mu*, at pg. 350, that "Mu failed to provide any evidence that it would have declared a higher value and paid a higher rate." This finding, or its underlying theory, is largely consistent with the basis considered by the 11th Circuit in its holding in this case.

In *Aetna Insurance Company v. M/V Lash Italia*, 858 F.2d 190 (4th Cir. 1988), the 4th Circuit found that an experienced shipper who made no inquiry into declaring a higher value demonstrates that it "made a business judgment . . . not to explore the possibility of obtaining greater protection . . . at a higher rate." at pg. 140.

As in this case, the court in *Aetna* considered various factors to address fair opportunity. The Court found that

there was a clause on the back side stating the limitation language and further that the tariff on file gave notice as well. It is not currently the position of the 4th Circuit, as stated by Petitioner, that the language must appear on the front side.

The 11th Circuit affirmed the Southern District of Alabama in *Sony v. Merivienti*, 863 F.2d 1537 (11th Cir. 1989), and held that where the bill of lading contains the language, an experienced shipper can be deemed to have the knowledge of section 4(5) of COGSA and must bear the costs of non-declaration. That holding is consistent with the 11th Circuit's holding in this case. In *Sony*, supra, the 11th Circuit cited *Brown and Root, Inc. v. M/V Peisander*, 648 F.2d 415 (5th Cir. 1981), a 5th Circuit case on similar issues.

In the case at bar, the 11th Circuit found that the freight forwarder who in fact authored these bills of lading, was in possession of master bills which were legible, but that by their own testimony they had not read. Eleventh Circuit's opinion at 2690.

In addition, they found that MAR SHIPPING LINE, INC's, tariff on file, provided the shipper with information had they intended to make use of it.

Finally, the Court looked at the experience of the shipper and its freight forwarder and weighed it in with the facts before them.

The 11th, 4th and 9th circuits, in addressing cases involving legibility and fair opportunity have considered the prior findings of each other and have decided cases based upon their facts. All concur that the burden of

proof of showing lack of opportunity shifts to the shipper once a *prima facie* showing is made.

The Courts have then addressed the facts before them, whether they refer to a short form, long form, tariff or other outside consideration.

In the case at bar as in other cases of the 4th and 9th Circuits, the Court found that fair opportunity was given on the basis of one or more of the factors, namely the tariff contained the limitation, the backside could be read with a magnifying glass, the shipper's agent had legible masters in its offices and the sophisticated shipper lacked intention to declare the higher value.

Respondent MAR SHIPPING LINE, INC. respectfully contends that there is no direct conflict with respect to the issue raised by Petitioner among the 4th and 9th and 11th Circuits and the findings of the 11th Circuit are consistent with the applicable decisions and the facts of this case.

## CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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